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No. 84-382

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Should certiorari be granted when the Supreme Court of Virginia presently has Petitioner's appeal under consideration and may rule in his favor on non-federal grounds and when Petitioner is also presently seeking to dismiss Respondent's cause of action on First Amendment grounds in a United States District Court?

II. Does a private homeowner who appears at zoning hearings on a proposed housing project next to his home lose his status as a "private individual" under the First Amendment?

III. Are false accusations by Petitioner of racist belief and racist behavior on the part of the Respondent entitled to the protection of an absolute privilege under the First Amendment?

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W. BEDFORD MOORE, III

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, W. Bedford Moore, III (Moore) respectfully prays that the petition for writ of certiorari of Petitioner, James N. Fleming (Fleming) be denied on the grounds that the issues raised in his petition are neither timely nor ripe for decision and the petition raises issues which are neither novel nor important for decision by this Court.

OPINIONS BELOW

Moore adopts Fleming's statement of the opinions below and his references to the trial transcript, trial exhibits and appendicies to the briefs filed in this Court.

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner has improperly invoked the Court's certiorari

jurisdiction under 28 U.S.C §1257(3) (1982) because he does not appeal from a "final" judgment below either in the traditional sense or as expanded by exceptions set forth in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477, 479 (1975). Fleming relies exclusively on the first test of Cox—the practical finality test—and asserts that since the Supreme Court of Virginia has denied an appeal on his federal grounds, the judgment of the trial court is final as to the federal questions, thus ending the case for all practical purposes. However, this case is now pending in the Virginia Supreme Court, and reversal of the trial court judgment and entry of final judgment in petitioner's favor is possible. Fleming has also asked the United States District Court for the Western District of Virginia to enjoin Moore from prosecuting any action for libel in this case (App. A). Fleming's complaint was filed August 9, 1984 and relies upon First Amendment grounds. A hearing on Moore's motions to dismiss and to stay proceedings in that case have been scheduled for November 30, 1984.

In Cox the decision of the Georgia Supreme Court finding a Georgia statute prohibiting the public disclosure of names of rape victims to be a legitimate limitation

of freedom of the press was held to be a final decision for the purposes of review in this Court, even though the decision resulted in further state court proceedings. Because either a reversal or a refusal of intermediate review of the state court decision would terminate the litigation, and because a refusal to review the state court decision immediately might "seriously erode federal policy," 420 U.S. at 483, the Court held it had jurisdiction to review the state court decision. The factors most significant to the Court were that the interests of judicial administration could be served by a reversal of the state court decision, and a refusal to pass on the constitutionality of the statute would leave the press in Georgia faced with a law of questionable constitutionality. Id. at 486. Thus, there was a substantial unresolved federal question involved in the action.

This Court has indicated the test of a final judgment is a pragmatic, not a formal one. Id. at 486. The test is whether the decision terminates "the litigation by fully determining the rights of the parties so that nothing remains to be done...except the ministerial act of rendering the judgment which the appellate court...directed." Gospel

Army v. Los Angeles, 331 U.S. 543, 546 (1947).

Fleming relies on the first judicial exception to the final judgment rule expressed in Cox at pages 477 and 479. This exception may exist when further litigation will take place in state court, but the federal issue is conclusive and the appellee, upon remand, is certain to succeed. 420 U.S. at 479. Conclusiveness of the federal issue has been construed very narrowly. Id. at 479. One of the cases cited in Cox is Mills v. Alabama, 384 U.S. 214 (1966), which involved a statute that imposed a substantial restraint on the First Amendment freedom of the press. The Alabama Supreme Court upheld a law that made it a criminal offense for any newspaper to publish an editorial on election day urging voters to elect particular candidates. Mills, the editor of the Birmingham Herald, published an editorial on election day urging the adoption of a mayor-council form of government. During his prosecution, Mills challenged the Alabama Corrupt Practices Act as unconstitutional on its face and as applied. After a trial court sustained his demurrer, the Supreme Court of Alabama reversed and remanded, holding the law valid. Alabama v. Mills, 278 Ala. 188, 195-96, 176 So.2d 844, 890 (1965). Other

cases cited in Cox involved an injunction against leaflet distribution by a private group; [1] a state court injunction against labor picketing where the court arguably had no jurisdiction to issue the decree;[2] a state court injunction against a claim brought under the Federal Employers' Liability Act by an injured employee;[3] and a sales tax measure levied upon an export.[4] In all these cases, the petitioners would have had no defense on remand and there were no significant factual issues remaining for decision.

Although a literal reading of the first exception to the final judgment rule in Cox appears to allow review of decisions where significant factual issues remain, in

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[1]Organization for a Better Austin v. Keef, 402 U.S. 415 (1971). (Although this case reviews a non-final determination, its careful qualifications avoid opening additional pathways to appeals of non-final judgments. This case actually reviews a "de facto permanent injunction" which is only labeled as temporary and non-final.)

[2]Local #438 v. Curry, 371 U.S. 542 (1963). (The National Labor Relations Board arguably had exclusive jurisdiction over the case.)

[3]Pope v. Atlantic Coastline Railroad, 345 U.S. 379 (1953). (The Court explicitly found there was no defense at trial and that there was "nothing left to be decided." Id. at 382.)

[4]Richfield Oil Corp. v. State Board of Equalization, U.S. 69 (1946). (The tax violated U.S. Const. art. I, §10, cl.2, which prohibits state taxation of exports.)

practice this Court has required that the federal question be presented without significant unresolved factual issues. Since the discussion of this category in Cox is dictum, a petition brought under this exception should encounter a restrictive interpretation of "conclusive." A petitioner must assert grounds conclusive of the action; Fleming fails to do so. The lawsuit must be "concluded" in practical terms; this case has yet to be argued before the Supreme Court of Virginia.

This case has not been concluded. Unlike Cox, Fleming petitions this Court for review in advance of the Virginia Supreme Court's decision on the merits of his state court appeal. The Virginia Supreme Court will be ruling on the following assignments of error: (A) The trial court erred in refusing to instruct the jury that in order to award compensatory damages, it must find Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true; (B) the trial court erred in refusing to strike Moore's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true; (C) the jury's award is so excessive that it indicates the jury

was influenced by passion, prejudice, or corruption, or misconceived or misconstrued the law or facts; (D) the jury's award of prejudgment interest at the rate of 12% per year is contrary to the law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

The Virginia court's decision regarding assignment of error (C) could result in reversal of the trial court and entry of final judgment for Fleming. Clearly, Fleming's petition for certiorari does not warrant application of the first exception to the final judgment rule in Cox. The petition precedes state court argument and rulings on assignments of error; there is no substantial unresolved federal question presented in the petition for the Court's consideration, and should the Supreme Court of Virginia remand for a new trial, there is no evidence that the appellee is certain to succeed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Moore adopts Fleming's statement of these provisions.

STATEMENT OF THE CASE

Moore has taught humanities at the University of Virginia since 1947 and resides in a racially intergrated

area of Albemarle County. His property shares a common border with a 128-acre parcel on the Rivanna Reservoir known as Evergreen, owned by Fleming and some white business partners. In October 1974 Fleming and his partners filed a special use permit application to build 804 housing units; the land was not zoned for this development, which could not be built as a matter of right (Tr. 307-08, 315, 334).

Moore knew nothing of the Evergreen plan until he was routinely notified by the county as an adjoining landowner of a site plan conference in November 1974. At that meeting, Moore spoke with Fleming about the possibility of purchasing a small fraction of an acre of land where Moore's driveway meets the public road, a subject they had discussed several years earlier (Tr. 65). However, after reviewing plans for this massive development, Moore realized he would be opposed to it. Thinking it would be dishonorable to negotiate privately with Fleming for the property at his driveway while publicly opposing the development, Moore wrote Fleming a short, polite letter to that effect (App. 13).

Moore's public opposition to Evergreen was brief

and insignificant. Fleming distorts and misrepresents the record in an effort to convince this Court that Moore was a leader of opposition forces in the Evergreen matter; nothing could be farther from the truth. Moore did not organize any efforts against Evergreen, he was neither an officer nor a director of any of the numerous citizens organizations that opposed Evergreen and he gave no interviews and made no statements to the press about Evergreen. As Moore put it, "I simply opposed it own my own account" (Tr. 73-74). The first Evergreen plan was proposed in October 1974 and defeated by the Albemarle County Board of Supervisors in January 1975. A second Evergreen plan was filed in November 1975 and Fleming published his libel in January 1976, a few days before the supervisors defeated the second plan. During that entire 16 month period, Moore spoke no more than three times; he never spoke for more than a few minutes and there is a record of what he said on only two of those occassions.

It is important to note that Moore never "took the rostrum" except in response to personal attacks on him by Fleming or Fleming's attorney. Moore only spoke up to set the record straight after being insulted or goaded by Fleming. Fleming now portrays these brief and generally

defensive remarks as being the vanguard of the opposition to Evergreen, an assertion that is as unsupported as it is preposterous.

At the January 1975 meeting of the supervisors on the first Evergreen plan, Moore spoke for a few minutes after being personally attacked by Fleming earlier in the meeting (DX 4 at 504-05). Moore's remarks concerned incompatible land use and the condition of the reservoir, and took less than five minutes to deliver. The verbatim transcript of that meeting is 27 pages long; Moore's comments occupy less than a full page. Moore's comments were overshadowed (indeed dwarfed into insignificance) by the extended and detailed remarks of others who spoke in opposition to Evergreen, including representatives of the Civic League, the Piedmont Environmental Counsel, a member of the state legislature, several university professors, a number of other civic and sportsmens' organizations, the League of Women Voters, the Virginia State Water Control Board and Bureau of Sanitary Engineering and others.

Moore's only other recorded remark at a public hearing occured twelve months later when the Albemarle County Planning Commission considered the second Evergreen

plan. Fleming's attorney questioned where Moore was when another housing development near Evergreen was considered by the Commission, which Moore perceived as a suggestion of hypocrisy on his part (DX 1). Moore's entire comment was that he was present when the other development was considered and he then asked the chairman of the commission if personal attacks were to be allowed at the meeting (DX 1). Moore did not comment on Fleming or Evergreen at that meeting.

Moore did not become identified in the public eye as a leader of the opposition to Evergreen. When questioned by Fleming's counsel at trial on this subject, Moore's attorney during the Evergreen controversy stated:

> I don't think the public knew about it. Perhaps people that attended those meetings might have seen him. But his name in a public sense might have appeared in the newspaper once or twice in three years. (Tr. 289)

Not surprisingly, Fleming never bothers to advise this Court of the enourmous public sentiment against Evergreen and the many individuals and organizations who, unlike Moore, did play significant roles in preventing the rezoning of the Evergreen tract (Tr. 295-98, 300, PX 8, 9, 10, 11, 12, 13, 17, DX 1, 4, 8). Fleming's assertion that "Moore's efforts to obstruct County approval of Fleming's development

were successful" is pathetic. There was no evidence that Moore's brief remarks had anything to do with the supervisors' disapproval of the Evergreen plan. However, Fleming's statement of facts might lead this Court to conclude Moore's opposition was the sole, proximate cause of the defeat of the plans. This assertion is groundless.

Evidence at the second trial of libel suit clearly established that Fleming used race as a weapon to intimidate and harass his opponents, including Moore. He injected it as an issue in the Evergreen development as early as October 1974 and vigorously renewed it at the supervisors' hearings on the first plan (Tr. 176, 182-88, DX 4, PX 9). Fleming sent the supervisors a letter captioned "THE TRUE FACTS" in which he raised racial bias as an issue before the supervisors ever expressed any opinions on his project (DX 4). His comments were so outrageous that the local newspaper published an editorial citing the numerous dangers to the reservoir posed by Evergreen and criticizing what it viewed as an obvious attempt by Fleming and his attorneys to use race as an excuse or weapon to obtain approval for Evergreen since it might not be approved if considered solely on its merits (Tr. 45-47). Fleming's first plan was defeated in January 1975. There was essentially no "Ever-

green controversy" during the period January through November 1975. In the latter month, however, Fleming hastily filed his second Evergreen plan after a group of conservation-minded supervisors were elected to take office in January 1976; protection of the reservior had been a central issue in that campaign (Tr. 434). Environmental concerns were again raised, this time bolstered by the fact that in the summer of 1975 the county and other local governments commissioned an exhaustive study of pollution of the reservior (Tr. 301-02, 321-22) and amended the local soil erosion ordinance to preserve the reservoir (Tr. 343-44). Fleming's second Evergreen plan, like the first, failed to address the county's water pollution concerns (Tr. 198-99, 295-305, 342-43, 345-46, PX 9, DX 1) and was defeated.

Fleming published his libelous attack on Moore just prior to the supervisors' consideration of his second plan. He chose to publish it in the student newspaper of the University of Virginia where he knew Moore made his livelihood (Tr. 224-28). Fleming acknowledged he believed university students would respond to a racially-motivated appeal since "Whenever you talk of racism they show a certain amount of interest, the better type of students show a certain amount of interest" (Tr. 229).

Fleming's accusations of racist belief and racist activity on the part of Moore were utterly false. Moore and several witnesses proved he was not a racist, had been raised to abhor racism and had never said or done anything which could be construed as racist. Fleming produced no evidence at trial tending to suggest there was any truth to his defamatory charges, and he has conceded in the libel appeal now pending in the Supreme Court of Virginia that "...Mr. Fleming never attempted to prove the truth of the statements in the advertisement as a defense to Mr. Moore's claims." (Appellant's Reply Brief at 3, Sup.Ct.Va., Record No. 831446).

Despite the falsity of his charges of racism, Fleming characterizes his charges as mere opinion and suggests that he "candidly" stated that he sincerely "believed" Moore was a racist. Fleming's testimony in this regard, as in most respects at the second libel trial, was inherently incredible. He was impeached on the stand with his own prior sworn testimony twenty-five times (Tr. 177-78, 180-81, 191-92, 193, 202-03, 203-04, 208-09, 219, 225, 225-26, 227-28, 228-29, 230-31, 232-33, 233-34, 238, 395, 398-401, 401, 401, 401-02, 402, 401-04, 404, 418, PX 14 and PX 15).

At trial Fleming attempted to prove his factual allega-

tions of racism against Moore but failed. He attempted to prove Moore's racism by alluding to certain negotiations between himself and Moore which occured fully four months after he published his libel, which of course had no bearing whatever on his publication of the libel (Tr. 179-181, 209-10). He attempted to establish Moore was a racist by asserting Moore had used a racial covenant in a 1935 deed against him (Tr. 208). The speciousness of this contention was laid bare when Fleming conceded that he knew racial covenants in deeds were unenforceable, that both Moore's alleged "use" of the racial covenant and Fleming's awareness of its existence occured after the libel was published, and, ironically, that the only person in the chain of title who ever made a deed to the Evergreen property which reimposed the 1935 racial covenant was Fleming himself when he conveyed his property to the Nature Conservancy (Tr. 210-14, PX 6, PX 7).

ARGUMENT

I. MOORE WAS A PRIVATE INDIVIDUAL THROUGHOUT THE EVERGREEN CONTROVERSY AND DID NOT LOSE THE FIRST AMENDMENT PROTECTIONS ACCORDED PERSONS IN THAT STATUS

Fleming carries the "public figure-private individual" inquiry past any logical extreme. In essence, his position is that any person who speaks out on any matter of public

concern becomes a public figure. Fleming knows only too well that Moore was not a leader of the opposition to Evergreen and Moore's opposition arose largely from his concern for his own private residence. Indeed, Fleming testified that the chief reason he libeled Moore was because the Albemarle County Planning Commission staff insisted that Fleming leave a buffer of existing trees between Evergreen and Moore's residence, a condition that would only benefit Moore personally and was not a matter of public concern (Tr. 82). Further, not only was this buffer a major motivating factor in the defamation, the evidence established beyond any doubt that Moore did not suggest, design, or advocate the buffer (Tr. 61). Thus, the so-called "public controversy" related chiefly to a matter that was of little or no concern to anyone other than the two parties to this action. It was, at most, an adjunct to a larger public controversy.

It is also important to note that Moore never thrust himself to the forefront of the Evergreen controversy. He was dragged into it quite unwillingly by Fleming as a result of Fleming's proposed plans and personal attacks by Fleming and his attorney. Moore was simply a private homeowner whose personal residence happened to adjoin an enormous

housing project planned by a group of local developers, black and white. As such, his attendance at public meetings, pursuant official notification to him by the county, was not unlike the resort to the processes of the courts by Mrs. Firestone in Time, Inc. v. Firestone, 424 U.S. 448 (1976). The majority in that case noted there is a certain amount of unavoidable public exposure involved when one resorts to the judicial process to exercise legal rights. 424 U.S. at 454. Moore had a legitimate interest in the Evergreen matter and had no choice but to attend administrative meetings in order to protect his limited private interest.

The specious and preposterous nature of Fleming's public figure argument is accentuated by his repeated and unwarranted resort to ad hominem attacks upon Moore. For example, he describes Moore's position as "a vigorously antagonistic stance" regarding Evergreen (petition for certiorari at 8) and argues Moore gave "strident voice to his opposition to the Evergreen development" (petition for certiorari at 17). There is absolutely nothing in the record to support these characterizations of Moore; indeed, Moore is a very private academician whose comments at trial and during the Evergreen matter were self-effacing and understated. No better proof of his low-key approach to

the whole matter exists than his brief, polite letter to Fleming declining to negotiate with him privately regarding land at his driveway (App. B). Perhaps Fleming feels he must "gild the lilly" to make Moore look like a public figure as defined in Harris v. Tomczak, 94 F.R.D. 687, 704 (E.D. Cal. 1983). Moore is not such a public figure, nor was the famous and very public Dr. Harris in that case.

Moore's participation in the Evergreen matter is not unlike that of the plaintiff in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In concluding it was plain that Gertz was not a public figure, this Court noted:

> He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue nor did he engage the public attention in an attempt to influence its outcome. 418 U.S. at 352.

There is no evidence that Moore ever became the object of any discernable degree of public attention or comment. See Hutchinson v. Proxmire, 434 U.S. 111, 135 (1979).

Similarly, in Wolston v. Reader's Digest Association, Inc., 413 U.S. 157, 167-168 (1971) this Court held "a private individual is not automatically transformed into a public

figure just by becoming involved in or associated with a matter that attracts public attention," emphasizing the importance of focusing on the "nature and effect of an individual's participation in the particular controversy giving rise to the defamation." It is inconceivable that a private individual who speaks out for a few minutes on two or three occasions over a 16-month period to protect his private interests would become a public figure, especially when his voice was perhaps the least among scores of voices raised in opposition to Evergreen. Indeed, the gravamen of Fleming's argument is not only that any person who speaks out on any subject related to a public controversy is a public figure, but that any libel defendant who singles out a private individual as the target of his libel during a public controversy also becomes a public figure, however involuntarily and unwillingly. This theory was specifically rejected by this Court in Hutchinson, supra, at 135.

II. FLEMING'S FACTUAL ASSERTION THAT MOORE HELD RACIST BELIEFS AND ENGAGED IN RACIALLY-DISCRIMINATORY BEHAVIOR IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION

Fleming relies heavily on this Court's language in Gertz that there is no such thing as a false idea, 418 U.S. at 339-40, to suggest that if any idea enters one's head, however

far-fetched or fanciful, it is somehow entitled to constitutional protection. The extreme application of this curious theory is found in Fleming's assertion at page 22 that since he subjectively concluded he was the victim of racism by Moore, having no facts to support that conclusion, his factual assertion of racist belief and conduct against Moore was an "idea" or "opinion" entitled to constitutional protection. It is no suprise he has no case law to support this theory.

Remarkably, Fleming has the audacity to argue here that he lacked the "high degree of subjective awareness of the probable falsity of his opinion," relying on New York Times v. Sullivan, 376 U.S. 254 (1964) (petition for certiorari at 21-23). One wonders how he can make this statement and yet, as noted before, represent to the Supreme Court of Virginia that he "... never attempted to prove the truth of the statements in the advertisement as a defense to Mr. Moore's claims" and failed to prove he had any basis for his charges against Moore. The answer was evident to the jury and should be evident here. Fleming made up grounds for his attacks on the witness stand and he now misrepresents his "state of mind" in his petition. As noted before, Fleming was impeached with his own prior sworn testimony twenty-five

times during the second trial of this case. Many of these impeachments related to his transparantly false protestations of a sincere belief that Moore was a racist and discriminated against him on the basis of race.

III. FLEMING'S ATTACKS WERE FALSE STATEMENTS OF FACT, NOT OPINIONS

Fleming misses the point entirely by arguing that he reached a conclusion regarding the motivation of his opponents and simply had no "serious doubts whatsoever" that this "opinion" might be factually incorrect. Fleming is deliberately blurring the line between fact and opinion to create a false impression of what he thought and intended. At trial, and later in his pending appeal in the Supreme Court of Virginia, Fleming attempted to show that Moore conducted himself in a specific fashion that indicated to Fleming he was opposed to Evergreen because of Fleming's race and/or the race of those persons who might live at Evergreen. He did not state any of these facts in his libelous advertisement, but clearly implied his accusations were based on certain undisclosed facts known to him.

Fleming captioned his libelous advertisement "RACISM" and Moore is the only living person named in the body of

the advertisement. Among other things he charged:

> ...We have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of Little Monticello does not want any black people within his sight.

This false and defamatory attack on Moore is part of a lengthy diatribe in which Fleming endeavors to create the impression that he is privy to specific facts arising out of the Evergreen controversy that support his accusations of racist belief and conduct on the part of Moore. Not only are the facts alleged about Moore untrue, there are simply no facts at all which support Fleming's conclusion that Moore was guilty of racially-motivated conduct. Under any standard enunciated since Gertz for delineating constitutionally-protected opinion, this diatribe is not protected "opinion" under the First Amendment.

It is surprising Fleming argues in his petition that his advertisement does not suggest to his readers that he is privy to certain undisclosed facts. Indeed, he leaves out most of the facts pertinent to the Evergreen controvery and simply states factual conclusions regarding the alleged racist beliefs and racist acts of Moore. Fleming's reliance

upon Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983) is misplaced. Judge Robinson's decisional framework strongly favors Moore's position. For example, he cites certain statements as "pure opinion" of which one is the "loosely defineable, variously interpretable" derogatory remark that forms a basis for Fleming's opinion argument. Id. at 845. However, the court notes such opinion would be recognized by listeners as not "imputing any specific wrongdoing," which stands in sharp contrast to what Fleming said about Moore. Id. at 846. The judge noted that the more difficult cases are those where the author's deductions or evaluations are stated but that also have some factual content, which he calls "hybrid" statements. Id. He concludes that in determining whether a hybrid statement is or is not privileged opinion one must first consider whether the author discloses to the reader "all pertinent background facts completely and accurately" since "the background facts transform the hybrid in the eyes of the reader from a judgmental conclusion suffused with unspecified, assumed assertions of fact into a simple statement of opinion drawn from enumerated grounds." Id. at 847. When facts are stated either erroneously or incompletely "the reader is unable to place the author's judgment in perspective" and a reader given incomplete

or incorrect facts "mistakenly supposing that all pertinent data are accurately assembled before him, might give even more credence to the author's conclusion." Id. at 848. To be sure, there is no "full and accurate narration of material background facts" in Fleming's advertisments, Id., and it is not entitled to constitutional protection. To like effect is the opinion in Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977) where the court concluded that the author of defamatory remarks who gives the impression of being knowledgeable about the subject matter but who does not disclose the factual basis for his conclusions, has no First Amendment protection for his defamation.

The opinion privilege, narrow as it is, does not encompass Fleming's defamation. Fleming seeks to have it both ways. At trial and in the Supreme Court of Virginia he has attempted to show Moore was a racist and that there were facts specifically establishing Moore's racism. He went so far as to regale the jury with testimony regarding his careful study of Webster's Third International Dictionary to obtain the definition of "racism" before he inserted it in his advertisement (Tr. 236-37). After this detailed definition was read into the record, Fleming could not cite facts regarding Moore's beliefs or actions which met the definitional

standards of the dictionary. Failing thusly, he expects this Court to simply dismiss Moore's action for defamation because Moore's racism is "an idea" which Fleming "held firmly."

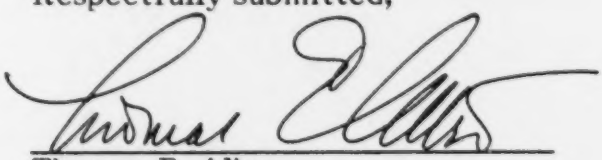
Even if Fleming's attacks could be characterized as "opinions," they were based on false facts that were plainly proved false at trial. As noted in Hotchner, supra, opinions based on false facts are actionable if the defendant"...had knowledge of the falsity or probable falsity of the underlying facts." 551 F.2d at 913. At trial Fleming claims his "opinions" of Moore were based on facts, but time and again these "facts" were shown to be fabrications. As noted above, Fleming cited as an underlying fact Moore's use of a racial covenant in a deed to thwart Evergreen, but he later conceded the "use" of the covenant and his own awareness of it arose four months after the libel was published (Tr. 179-81, 209-10). Fleming also cited as an underlying fact Moore's failure to oppose white developers in the vicinity of Evergreen and asserted that two white developers told him this; however, on cross-examination he conceded he had not discussed this subject with the two developers before libeling Moore (Tr. 201-04). In his appeal to the Supreme Court of Virginia Fleming had the temerity to cite Moore's interest in buying land near his driveway as a fact which led him to call Moore

a racist when at trial he never once testified about Moore's inquiries nor did he ever testify that Moore's inquiries had any bearing on his publication of the libel. (Appellant's Brief at 8, Sup.Ct.Va. Record No. 831446).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied. Respondent respectfully requests an award of his attorney's fees and costs expended herein under the provisions of Rule 49.2 on the ground that the petition for certiorari is frivilous. Respondent will submit a statement of fees and costs after this brief is filed.

Respectfully submitted,



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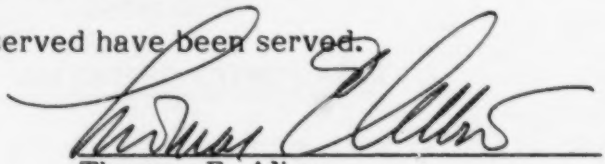
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 1984 I served counsel for petitioner with three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same, first class postage prepaid to counsel for Respondent at the following address:

D. Alan Rudlin
W. Jeffrey Edwards
HUNTON & WILLIAMS
P.O. Box 1535
Richmond, Virginia 23212

All parties to be served have been served.



Thomas E. Albro

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

JAMES N. FLEMING, 304-A Ridge Street Charlottesville, VA 22901 Plaintiff,	:	
v.	:	CIVIL ACTION No. 84-004-C
W. BEDFORD MOORE, III, Shack Mountain Route 5, Lambs Road, State Route 657 Charlottesville, VA 22901, Defendant.	:	

AMENDED COMPLAINT

1. This is an action for injunctive relief to protect rights, privileges and immunitites of the plaintiff guaranteed by the Constitution and laws of the United States. Further, the plaintiff seeks damages, attorneys fees and other relief in vindication of his right, protected by the First Amendment to the Constitution of the United States, to express and publish opinions and ideas for the bringing about of political and social change or for other lawful purposes.

2. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331 and 1343(3). This action arises under the First Amendment and under the

Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and under Title 42, United States Code, Section 1981 and 1983.

3. The plaintiff, Fleming, was born in Albemarle County, Virginia, on January 27, 1929 and thereafter, except for four years in military service and six years in college and post graduate study, he has lived in Albemarle County or in the adjacent City of Charlottesville. The plaintiff is a black person. All other persons hereinafter mentioned or referred to are white persons, unless otherwise indicated.

4. The defendant, W. Bedford Moore, III, is a tenured professor in the Humanities Division at the School of Engineering and Applied Sciences of the University of Virginia where for over twenty years he has taught. In the 1975-76 academic year he was an associate professor.

5. At all times material, Fleming believed that, with several exceptions, white citizens of Albemarle County and its environs asperse, debase, degrade, discredit, disparage, and reproach black people. The reasonableness of that belief was demonstrated in the second trial of the litigation hereinafter mentioned when Bernard Chamberlain, Esquire, a life long resident of Albemarle County and a practicing attorney since 1922, upon being asked on direct

examination by Moore's counsel if in their twenty-five years of intimate acquaintance he had heard Professor Moore say anything degrading about black people, answered in these words: "I never have, strange thing, I never have".

6. The defendant Moore and his wife own and reside on a 100 acre tract in Albemarle County known as Shack Mountain. Their dwelling house, sited on a ridge, is described in the testimony of an emeritus teacher of architecture at the University of Virginia as a twentieth century version of Thomas Jefferson's Monticello.

7. Prior to 1974 the plaintiff, Fleming, had acquired title to 81.5 acres adjoining which were 32+ acres belonging to Flamenco, a corporation the stock of which was owned equally by Fleming and B.B. Woodson. These two parcels, for more than 3,000 feet, adjoin the defendant's Shack Mountain. Another tract, adjacent to the 81.5 acres and to the 32+ acres and containing 14+ acres, was owned by Dailey Craig. The owners of these 128 acres, more or less, had agreed to develop thereon a residential subdivision to be known as Evergreen.

8. On or about _____ November 1974, the plaintiff, Fleming, and his associates submitted to the Planning Commission for Albemarle County a plan for the development

of Evergreen as a planned unit development of six dwellings per acre, with an average price of $35,000 (Evergreen I). The intent of the developers, and particularly of Fleming, to sell homes to persons of either race was prominent.

9. Out of ostensible concern for the proposed influx of 2,400 people viewed by them as an invasion of the peace and harmony on Shack Mountain and, further, out of professed concern for increased pollution of the reservoir as in their perception the Evergreen plan forebode, Professor and Mrs. Moore attended the site plan meeting on the Evergreen project in November 1974. On that occasion Moore expressed to Fleming an interest in acquiring a fraction of an acre of Fleming's land and was given a copy of the subdivision plat. The two men exchanged promises that Moore and the proponents of Evergreen would meet within ten days to negotiate.

10. Under date of 27 November 1974, Moore informed Fleming of his decision to abandon the proposed negotiations and to oppose the Evergreen project in the public hearings, explaining his decision in these words: "as I feel I must do for the good of my neighbors and the county as a whole." A copy of the letter is herewith filed as Exhibit "A".

11. At two subsequent meetings of the Planning

Commission held in or about January of 1975 the defendant, Moore, addressed the Commission in opposition to the proposed plan for Evergreen as did many other persons, several of whom were professors at or otherwise identified with the University of Virginia. The only black person who spoke in opposition to Evergreen was then the Mayor of the City of Charlottesville who expressed official concern for the reservoir which supplies drinking water for the inhabitants of the City. Among those who spoke in opposition was the Professor Frederick Nichols, Chairman of Architectural History at the University, who expressed concern for the historical aspect of Shack Mountain. The defendant's speech at the January 22, 1975 meeting of the Board of Supervisors, in opposition to Evergreen I, is herewith filed as Exhibit "B". At a subsequent meeting of the Board of Supervisors, Evergreen I was defeated.

12. In or about September of 1975 and at the instance of Professor Frederick Nichols, a social and professional colleague of Professor Moore for about thirty years and a member of the Virginia Historic Landmark's Commission from its beginning, Shack Mountain was designated by that Commission as one of the most important buildings in the cultural history of the state. In support of this proposed

designation, the Dean of the School of Architecture of the University of Virginia had explained that the siting of the place on the ridge with the view enhanced by cut out windows in the trees is a part of the architectural conception which makes the building so important. A housing development visible from the back porch of the Shack Mountain dwelling house or from the flower garden would spoil this architectural conception.

13. Sometime before a second plan for the development of Evergreen had been submitted, the defendant, Moore, discussed the historic character of Shack Mountain with his representative on the Board of Supervisors.

14. In or about November of 1975, the plaintiff, Fleming, and his associates submitted to the Planning Commission a second plan for the development of Evergreen (Evergreen II) which proposed the erection of two and one-half dwelling units per acre rather than the six units proposed in the first plan.

15. The defendant, Moore, continued to oppose the development of Evergreen.

16. The Planning Office provisionally approved this second plan for the developing of Evergreen; one of the conditions for approval being the reservation of an eight

acre tree buffer, a strip 100 feet wide along the border with Shack Mountain, to mask the Evergreen development from the view from Shack Mountain.

17. Before these conditions had been communicated to the plaintiff or his associates, the defendant, Moore, obtained a mimeographed copy of the conditions on the same night they were determined by the Planning Commission.

18. At two public meetings of the Planning Commission and at two public meetings of the Board of Supervisors, the defendant, Moore, was in attendance in opposition to Evergreen II and at one or more of such meetings he was represented by James B. Murray, Jr., Esquire, who, asserting his role as attorney for W. Bedford Moore, III, spoke in opposition to Evergreen II.

19. By letter of 11 December 1975, on behalf of Mr. and Mrs. Bedford Moore, James B. Murray, Esquire, suggested that he meet with Fleming and his associates and his attorney Edgar F. Puryear, Esquire, to whom the letter was addressed, to discuss changes in Evergreen II which the Planning Commission had required; the buffer strip being the only change specifically mentioned in the letter. A copy of this letter is herewith filed marked Exhibit

"C".

20. By this manifestation of Moore's interest in the proposed 100 foot buffer strip on Fleming's property for the entire length of their common boundary, together with the rather obvious fact the Fleming's loss of the use of eight acres of his land would benefit no one but Moore, the plaintiff was led to believe that Moore had instigated the idea of the tree buffer for one or both of two purposes: (1) to further reduce the population density of Evergreen by some twenty dwelling units "for the good of [his] neighbors and the county as a whole"; and (2) to screen the low cost housing development from the view of Shack Mountain, for the good of the owners of Shack Mountain and their successors in title.

21. In each of the plans for the development of Evergreen, the plaintiff and his associates had shown that the several dwelling units would be connected to the municipal water mains and that sewage from the Evergreen development would be pumped into the minicipal sewer lines.

22. The plaintiff was aware that lands owned by other persons in the immediate vicinity of the proposed Evergreen development were zoned to permit residential developments of higher density than that proposed for

Evergreen and, further, that such development of those lands was not conditioned upon the pumping of sewage into the municipal sewer lines. Immediately across State Highway 743 from Evergreen and between Evergreen and the reservior were three tracts, aggregating approximately 100 acres, zoned to permit six dwelling units per acre. Adjacent to and east of Evergreen there were approximately 45 acres zoned to permit twenty dwelling units per acre. Adjacent to and south of Evergreen was a duplex development, with a population density of six units per acre, all of the occupants of which are white. The natural drainage of all of these lands is into the reservior.

23. Plaintiff, Fleming caused to be published in the January 16, 1976 edition of the Cavalier Daily (a newspaper published at the University of Virginia) and, also, in the Charlottesville-Albemarle Tribune (a newspaper published in the City of Charlottesville) an article captioned "RACISM" the full text of which is filed as Exhibit "D" hereof. Of and concerning the defendant Moore the articles says:

> "There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the development community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive

> working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight."

24. On or about May 20, 1976, the defendant, Moore, through his attorney, offered to pay the plaintiff, Fleming, $25,000 for a one hundred feet strip adjoining Shack Mountain. On another occasion, a meeting of the Board of Supervisors, Moore inquired and ascertained from the curator of Monticello that Thomas Jefferson had, indeed, located his slaves' quarters down hill from and in sight of his mansion house.

25. On 3 January 1977 the instant defendant, Moore, filed in the Circuit Court of Albemarle County an action for damages against the instant plaintiff, Fleming, demanding $500,000 in actual damages and $500,000 in punitive damages, predicated on a charge that the 16 Janaury 1976 publication was a false, scandalous, malicious, insulting and defamatory libel of and concerning him (Moore) and that same had been wrongfully, willfully, maliciously and injuriously published by Fleming. At or about the same time, the instant defendant, Moore, filed a similar action in the Circuit Court of the City of Charlottesville which

has not been called for trial.

26. The first trial of the libel action ended on December 6, 1977 with a jury verdict awarding Mocre $10,000 in compensatory damages and $100,000 in punitive damages, on which the trial court entered judgment on April 28, 1978. Over the dissent of Justice Harrison who would have reversed and entered final judgment for the defendant (Fleming), the Supreme Court of Virginia reversed the judgment of the trial court and remanded the case for a new trial. (Fleming v. Moore [March 6, 1981], 221 Va. 884, 275 S.E. 2d 632).

27. The Supreme Court of Virginia read the record as showing that Moore merely resorted to an administrative body in order to protect the value of his own residence and, hence, held that Mocre's role in the public hearings concerning "Evergreen" do not merit his classification as a public figure with the burden of showing, as a prerequisite to recovery of compensatory damges, that Fleming acted with malice. However, the record then before the Supreme Court did not contain the text of Mocre's 27 November 1974 letter to Fleming (Exhibit "A") wherein Moore classified his intended opposition to Evergreen as "[something] I feel I must do for the good of my neighbors

and the county as a whole."

28. The second trial of the libel action ended on October 22, 1982 with a jury verdict awarding Moore $100,000 in compensatory damages and $250,000 in punitive damages, together with interest on the $250,000 award at the rate of 12% per year from January 16, 1976. Moore's counsel had peremptorily struck every black citizen from the venire and thus caused the jury to be entirely composed of white citizens. Judgment on this verdict was entered on June 3, 1983.

29. The 27 November 1974 letter from Moore to Fleming (Exhibit "A" herein) was received as evidence in the second trial of the libel action. No pecuniary or other loss was shown. Neither was there evidence of actual malice. There was a complete absence of evidence that Fleming had any question, much less serious doubts, as to the truth of his opinion of Moore's motivations. Nevertheless, on proof limited to Moore's claim that on occcasions he was upset and embarrassed, the all white jury levied against Fleming the largest libel verdict ever upheld by a trial court in the Commonwealth.

30. By order entered on 7 June 1984 the Supreme Court of Virginia awarded James N. Fleming an appeal

from the judgment of the Circuit Court of Albemarle County, limited to four assignments of error, viz:

D. The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

E. The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

G. The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

H. The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was

false or had reckless disregard for whether or not it was true.

31. In so doing, the Supreme Court of Virginia rejected other assignments of error, viz:

A. The trial court erred in failing either to grant Fleming's Motion to Dismiss or strike plaintiff's evidence because the alleged libel was an absolutely privileged expression of opinion under the First Amendment.

B. The trial court erred in failing to strike plaintiff's evidence because the alleged libel was not defamatory as a matter of law.

C. The trial court erred in failing either to grant Fleming's Motion for Summary Judgment or his motion to strike plaintiff's evidence because plaintiff failed to prove special damages, which must include but are not limited to monetary loss.

F. The trial court erred in concluding that Moore was not a public figure.

I. In the specific circumstances and context of this case, the plaintiff's striking every

black juror to create a jury without blacks deprived Fleming of his right to due process under the Fifth and Fourteenth Amendments and to a jury trial under the Seventh Amendment.

32. By reason of the two verdicts in the libel action, found by all-white juries, by each of which the instant plaintiff was cost solely because of his race and on each of which the trial court entered judgment, and by reason of the summary affirmance of the rulings of the trial court to which assignments of error "A", "B", "C", "F", and "I" were asserted in the Supreme Court of Virginia, the plaintiff, Fleming, is persuaded that, unless this court will intervene, the First Amendment does not protect his freedom in or near Albemarle County to speak or to publish his opinions on matters of public concern, particularly or racial issues, if the object of his intended criticism is a white person. The chilling effect of the pending libel actions impels the plaintiff to forego such participation in the public exchange of ideas.

33. The plaintiff is a realtor and a considerable part of his income has come from his buying and selling real estate. On or about 6 June 1983 the defendant, Moore,

caused said 3 June 1983 judgment to be docketed in the Clerk's Office of the Circuit Court of Albemarle, in the Clerk's Office of the Circuit Court of the City of Charlottesville, and in the Clerk's Office of the Circuit Court of the City of Waynesboro, in which political subdivisions the plaintiff, Fleming, owns real properties which constitute the bulk of his estate. The plaintiff's conduct of his business and his earning a livelihood is and will continue to be hampered by the fact that the judgment in the libel action has been docketed in the several Clerk's Offices and appears to be a lien upon the plaintiff's real estate. An irrevocable letter of credit was obtained and accepted by the trial judge in lieu of surety for the initial appeal bond in penalty of $250,000. Subsequently, on motion of Moore's counsel, the Supreme Court of Virginia required additional bond with approved surety in penalty of $480,000. The plaintiff's access to working capital has been egregiously curtailed as a result of the requirements of appeal bond in penalty of $710,000.

34. Plaintiff, Fleming, has paid or obligated himself to pay enormous sums of money in the defense of the libel action and in prosecuting appeals from judgments therein. Unless relief as herein prayed will be granted, the plaintiff's

prospects for relief are and will be limited to the unlikely possibility that the Supreme Court of the United States will grant certiorari to review the 7 June 1984 rejection, by the Supreme Court of Virginia, of his claim of privilege under the First Amendment to the Constitution or the probability that, at best, the Supreme Court of Virginia will again remand the libel action for a third trial. Meanwhile, the plaintiff is and will continue to be deprived of the day to day protection of the First Amendment, will continue to suffer diminution, if not a deprivation, of his ability to carry on his business and to earn a livelihood.

35. Moreover, the continued prosecution of the libel actions and the appearance of liens encumbering plaintiff's properties and the inordinate requirements of bond of such magnitude as to disestablish the plaintiff's credit combine to effect a deprivation of plaintiff's property without due process of law in violation of the Fourteenth Amendment to the Constitution.

WHEREFORE, the plaintiff prays:

a. That the court will set this matter for an early hearing on the merits and thereupon adjudge and decree that the publication, which is the basis for the judgment of the Circuit Court of the County of Albemarle entered

on June 3, 1983 in favor of W. Bedford Moore, III and against James N. Fleming, is indeed within the protection of the First Amendment and that the said judgment is null and void and of no effect in law.

b. That the defendant, W. Bedford Moore, III will be permanently enjoined and restrained from causing execution to be issued upon, or otherwise taking any steps to enforce payment of, the judgment of the Circuit Court of the County of Albemarle entered on June 3, 1983 in favor of W. Bedford Moore, III and against James N. Fleming.

c. That the defendant, W. Bedford Moore, III, will be permanently enjoined and restrained from further prosecuting any action for libel against the plaintiff, James N. Fleming, which may be predicated upon the enouncement the full text of which is reproduced as Exhibit "D" hereof.

d. That the plaintiff will recover of the defendant damages in compensation for his costs, expenses, counsel fees, harrassment, and loss of time in defending the action for libel, and his costs and reasonable counsel fees incident to this action, and such other and further relief as is just.

/s/ James N. Fleming
James N. Fleming

GERALD G. POINDEXTER
P.O. Box 766
Surry, VA 23883

/s/ S.W. Tucker
S.W. TUCKER
HILL, TUCKER & MARSH
509 North Third Street
P.O. Box 27363
Richmond, VA 23261-7363

Counsel for Plaintiff

VERIFICATION

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

Before me, the undersigned Notary Public for the State of Virginia at Large, personally appeared JAMES N. FLEMING in the City aforesaid and made oath that the matters and things stated in the foregoing complaint by him subscribed are true to the best of his knowledge, information and belief.

Given under my hand and Notarial Seal this 2nd day of August, 1984.

My commission expires: May 24, 1986

/s/ Nathaniel W. Smith
Notary Public

CERTIFICATE

I certify that on the 6th day of August, 1984, a copy of the foregoing Amended Complaint with Exhibits A, B, C, and D was mailed by Certified Mail #570767 to W. Bedford Moore, III, Shack Mountain, Route 5, Lambs Road, State Route 657, Charlottesville, VA 22901.

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27 November 1974

Mr. James N. Fleming
Ideal Realty Company
304-A Ridge Street
Charlottesville, Virginia 22901

Dear Mr. Fleming:

I write to you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings—as I feel I must do for the good of my neighbors and the county as a whole.

Let me assure you that there is absolutely nothing personal in my opposing you on this matter.

Sincerely yours,

Bedford Moore

BM:pa